IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| GEORGE ROSS,<br>Petitioner | : | CIVIL ACTION |
| v. | : | |
| W. CONWAY BUSHEY,<br>Secretary<br>Commonwealth of<br>Pennsylvania Board of<br>Probation and Parole | : | NO. 99-1391 |

**M E M O R A N D U M**

**Padova, J.**

Petitioner, George Ross, a state prisoner incarcerated at the State Correctional Institute in Graterford, Pennsylvania, filed a pro se Petition for a Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2241(c)(3) (1994). In accordance with 28 U.S.C.A. § 636(b)(1)(B) (West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Peter B. Scuderi for a Report and Recommendation ("Report"). Magistrate Judge Scuderi recommends that the Court dismiss the Petition; Petitioner filed timely objections. For the following reasons, I will overrule Petitioner's objections, adopt the Magistrate Judge's Report, and dismiss the Petition.

I. FACTS AND PROCEDURAL HISTORY

In March of 1980, George Ross was convicted of rape and assault in the Court of Common Pleas, Lehigh County,

Pennsylvania, and sentenced to sixteen to forty years imprisonment. (Pet. at 2.) Ross became eligible for parole on May 11, 1996. On December 11, 1997, the Pennsylvania Board of Probation and Parole ("Board") reviewed Petitioner's file and denied his application for parole based upon a series of factors. (Pet. Exh. A.) The Board scheduled his next review for October of the following year, stating that in order to have his application approved, he must participate in a prescriptive program plan. Under this program, Ross must complete a sex offender program, maintain a clear conduct record, and earn an institutional recommendation for parole. (Id.)

Ross appealed denial of his parole to both the Department of Corrections ("DOC") and the Board on the grounds that the Board "had relied on erroneous and derogatory information to refuse his parole suitability," and requested that the erroneous information be expunged from his file. (Pet. at 3.) Ross never received a response from the Board. In response, the DOC admitted that several facts contained in its parole summary and files contradicted the conclusions stated by the Board in its order denying his parole. (Pet. Exh. B.) Specifically, the DOC had no record of substance abuse, and it characterized Ross' overall institutional adjustment as being 'good.' (Id.) The DOC, however, stated that the conduct report section of the parole summary indicated that Ross had two Class I misconducts since 1983 with

the last one being in 1994. (Id.)

Ross' next parole review occurred in November of 1998. On November 30, 1998, the Board once again denied his parole application. (Pet. Exh. C.) The Board scheduled his next review for May, 2000, and stated that at that time it would consider whether Ross had successfully completed the same prescriptive program previously described in its December 11, 1997 order, and participated in an mental health treatment program.

On April 8, 1999, Ross filed the instant petition for habeas corpus with this Court pursuant to 28 U.S.C. § 2241(c)(3). In essence, Ross alleges that the Board violated his procedural due process rights by relying on erroneous information regarding his conduct record while in prison, drug use and his successful adjustment to prison; and refusing to give him the opportunity to correct the misinformation.[1] Ross also objects that by repeatedly requiring him to meet goals that he has already met and by setting his parole review dates eighteen months apart, the Board acted arbitrarily and capriciously in violation of his

[1]Ross' first ground for relief states:

> Respondents abuse their discretion when relying on erroneous and derogatory information to refuse parole suitability. Especially when that information relied on has been shown to be incorrect, and requested that it be expunged from his file.

(Pet. at 6.)

substantive due process rights.[2]

By Order dated March 31, 1999, this Court referred the Petition to Magistrate Judge Scuderi for a Report and Recommendation. On June 3, 1999, Judge Scuderi filed his Report without ordering the government to respond to Ross' petition, and recommended that Ross' Petition be denied. Ross filed Objections to the Report on June 14, 1999.

II. STANDARD OF REVIEW

Although Ross filed his Petition under section 2241, this Court will treat the Petition under section 2254 which applies to persons "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[3] 28 U.S.C.A § 2254(a) (West 1999).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214, made numerous changes to

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[2]Ross' second ground for relief states:

> Respondents act impermissibly and in violation of Petitioner's due process rights, when Petitioner maintains his innocence, and the Respondents acquiesce with parole refusal, and then arbitrarily set eighteen month intervals ordering the same requisite that the Petitioner had successfully completed before two prior interviews to gain parole entitlement.

(Pet. at 6.)

[3]Although I have previously decided state prisoners' habeas corpus petitions involving the denial of parole under section 2241, e.g., Bradley v. Dragovich, No. CIV. A. 97-7660, 1998 WL 150944, *1 (E.D. Pa. March 27, 1998), upon reflection, I believe that section 2254 provides a more appropriate jurisdictional basis in the instant case.

Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions. Section 2254(d)(1), as amended by AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States....

28 U.S.C.A. § 2254(d)(1) (West 1996). A habeas writ should not be granted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo v. Superintendent Scialbion, 171 F.3d 877, 890 (3rd Cir. 1999). Federal courts may also consider the decisions of inferior federal courts when evaluating whether the state court's application of the law was reasonable. Id.

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b) (West 1993).

## III. DISCUSSION

### A. EXHAUSTION

Under Section 2254, a writ of habeas corpus may not be granted unless the applicant has exhausted all remedies available in state court. 28 U.S.C.A. § 2254(b)(1)(A) (West 1999). This exhaustion requirement is excused where no available state corrective process exists or when particular circumstances exist such that the state processes are rendered ineffective to protect the applicant's rights. 28 U.S.C.A § 2254(b)(1)(B) (West 1999). Failure to exhaust state remedies is excused only when state law clearly forecloses state court review of the unexhausted claims. Toulson v. Beyer, 987 F.2d 984, 987 (3rd Cir. 1993). However, an application for a writ of habeas corpus may be denied on the merits, despite the petitioner's failure to exhaust his state court remedies. 28 U.S.C.A. § 2254(b)(2) (West 1999).

Considerable confusion exists as to whether any avenues for state prisoners to gain judicial review of Board decisions denying parole are open under Pennsylvania law.[4] Recently, Pennsylvania courts have held that neither habeas corpus[5] nor

[4]Last month, the United States Court of Appeals for the Third Circuit filed a Petition for Certification of Questions of Law to the Pennsylvania Supreme Court requesting clarification of state law regarding the availability of judicial review of decisions to deny parole when a constitutional or statutory violation has occurred. Coady v. Vaughn, C.A. No. 98-1311, E.D. PA No. 97-CV-07498 (3rd Cir. August 25, 1999)(expressing uncertainty as to "whether [the Pennsylvania courts] intended to foreclose direct review of parole denials that are alleged to violate constitutional rights other than the right to be free from deprivation of a liberty interest in parole"). Since this Court will deny Ross' petition on the merits, this certification petition does not impact the outcome of this case.

[5]Habeas corpus is unavailable because it challenges only the legality of a sentence or conditions of a prisoner's confinement.

direct appeals[6] were available to challenge Board decisions. Rogers v. Pa. Bd. of Probation and Parole, 724 A.2d 319, 322 (Pa. 1999); Weaver v. Pa. Bd. of Probation and Parole, 688 A.2d 766, 777 n.17 (Pa. Commw. Ct. 1997). Although the state court left open the possibility of a successful writ of mandamus to challenge Board decisions on constitutional grounds, such writs are of limited utility to most prisoners. Weaver, 688 A.2d at 776-77. Mandamus is only available to compel the Board to perform its ministerial or mandatory duty and apply the proper law. Id. at 777.

> Mandamus would only be issued if [petitioner] could show that the Board's refusal to grant parole, as evident solely in its decision, was, as a matter of law, based upon an erroneous conclusion that it had the discretion to deny parole for the reasons given. ... Mandamus cannot be used to say that an agency considered improper factors, that its findings of fact were wrong, or that the reasons set forth in its decision are a pretense.

Id. It is unclear whether a writ of mandamus would be a suitable vehicle for state court review in the instant case. However, because the Court will deny Ross' petition on the merits, the Court need not decide whether Ross' claims are fully exhausted.[7]

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Weaver, 688 A.2d at 777 n.17.

[6]Because Board decisions do not constitute agency adjudications, Pennsylvania courts lack statutory jurisdiction to review Board decisions on appeal. Rogers, 724 A.2d at 322.

[7]Similarly, the Court need not consider whether any procedural defaults occurred.

B. PROCEDURAL DUE PROCESS

Ross claims that by relying on erroneous information regarding his conduct record while in prison, drug use and the success of his adjustment to prison, and by refusing to give him the opportunity to correct the misinformation, the Board violated his rights to procedural due process under the Fourteenth Amendment. This Court concludes that because Pennsylvania law does not give a convicted person a liberty interest in obtaining release on parole, the Board's denial of parole does not violate Ross' procedural due process rights.

The Fourteenth Amendment states in pertinent part: "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV § 1. This provision protects individuals against arbitrary government action. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). To establish that the state has violated an individual's right to procedural due process, a petitioner must (1) demonstrate the existence of a protected interest in life, liberty, or property that has been interfered with by the state, and (2) establish that the procedures attendant upon that deprivation were constitutionally insufficient. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908, 104 L.Ed.2d 506 (1989).

To constitute a liberty interest, an individual must have a

legitimate claim or entitlement to the subject of the deprivation. Id. Since the Constitution does not provide any legitimate claim to parole, any valid interest must emanate from state law. Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 11-12, 99 S. Ct. 2100, 2105-2107, 60 L.Ed.2d 668 (1979).[8] Pennsylvania state courts have consistently held that parole is not a constitutionally protected liberty interest under state law. Rogers, 724 A.2d at 323.[9] See also Bradley, 1998 WL 150944, at *2 (holding that at the point when the petitioner completed his minimum sentence, no constitutional right to parole sufficient to trigger procedural safeguards had vested). Accordingly, the Court will deny Ground I of Ross' Petition.

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[8]The U.S. Supreme Court's recent decision in Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L.Ed.2d 418 (1995), does not affect this analysis. Sandin held that states may create liberty interests cognizable under due process, but such interests are limited to "freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, ..., nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484, 115 S. Ct. at 2300.

While the Third Circuit has not addressed the subject, several appellate courts have held that Sandin is not relevant to parole cases. See Ellis v. Dist. of Columbia, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996); Orellana v. Kyle, 65 F.3d 29, 32 (5th Cir. 1995). In addition, the Court expressly stated that the change in its methodology did not require overruling any of its prior holdings. Sandin, 515 U.S. at 484 n.5, 115 S. Ct. at 2300 n.5. Thus, Greenholtz is still good law.

[9]Federal courts are "bound by a state's interpretation of its own statute." Garner v. Louisiana, 368 U.S. 157, 166 (1961).

C. SUBSTANTIVE DUE PROCESS

Ross asserts that by requiring him to meet criteria that he has already fulfilled and setting parole hearing dates eighteen months apart, the Board is acting arbitrarily and capriciously in violation of his rights under substantive due process. In addition, the Court construes Ross' complaint to claim that using erroneous information to make parole decisions violates substantive due process rights. This Court concludes that Ross' claims are without merit because the factors relied on by the Board in denying his parole are consistent with those considerations that are mandatory under the Pennsylvania statute; and because, notwithstanding the erroneous information, the Board relied on numerous other factors that Ross has not alleged are factually inaccurate.

The Third Circuit has recognized a cause of action under substantive due process that is distinct from procedural due process. Burkett v. Love, 89 F.3d 135, 139-40 (3rd Cir. 1996); Block v. Potter, 631 F.2d 233, 236 (3rd Cir. 1980). Even if no liberty interest or rights exist to a government benefit, there are certain reasons upon which the government may not rely in exercising its discretion. Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). Under substantive due process, a state may not deny parole on constitutionally impermissible grounds, such as race or in

retaliation for exercising constitutional rights. Burkett, 89 F.3d at 140. Similarly, the Board may not base a parole decision on factors bearing no rational relationship to the interests of the Commonwealth. Block, 631 F.2d at 237.

Pennsylvania law grants the Board vast discretion to refuse or deny parole. State law authorizes the Board:

> to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to the board ... whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

61 Pa. Cons. Stat. Ann. § 331.21 (West 1999). When presented with discretionary schemes, the role of judicial review "is to ensure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations." Block, 631 F.2d at 236. Essentially, the court reviews the Board's decision for abuse of discretion. Id.

Under Pennsylvania law, the Board must consider the following factors: (1) the nature and circumstances of the offense committed; (2) any recommendations made by the trial judge and prosecuting attorney; (3) the general character and background of the prisoner; (4) participation in a crime of violence; (5)conduct of the person while in prison; and (6) his physical, mental, and behavior condition and history. See 61 Pa.

Cons. Stat. Ann. § 331.21 (West 1999). Consistent with this statute, the Board relied on seven factors in refusing Ross' application for parole:(1) poor prison adjustment; (2) substance abuse; (3) assaultive instant offense; (4) a very high potential for assaultive behavior; (5) victim injury; (6) Ross' need for counseling; (7) receipt of an unfavorable recommendation from the District Attorney and the DOC. (Pet. Exh. A.)

Ross only alleges that two of these factors are based on erroneous information namely, substance abuse and poor prison adjustment. This fact, however, is immaterial because any one out of the seven listed factors would have been sufficient to support the Board's decision. In Ross' case, there were adequate grounds outside of the ones based on erroneous information to justify denial of parole. Therefore, the Court finds that no violation of Ross' substantive due process rights arose from the Board's alleged reliance on erroneous information.

As for Ross' contention that by scheduling his hearings eighteen months apart the Board acted arbitrarily, Pennsylvania law states that "[h]earings of applications shall be held by the board whenever in its judgment hearings are necessary." 61 Pa. Const. Stat. Ann. § 331.22 (West 1999). The statute thus leaves the scheduling of parole hearings completely within the Board's discretion. Ross does not allege that the Board used impermissible considerations when scheduling his parole review

hearings. For this reason, the Court is unable to conclude that the Board acted arbitrarily or capriciously in violation of substantive due process. Therefore, the Court denies Count II of Ross' Petition.

IV. CERTIFICATE OF APPEALABILITY

In the event the Court does not agree with his Objections, Petitioner requests that he be granted leave to appeal the Court's decision to the Third Circuit.

Under 28 U.S.C.A. § 2253(c)(1)(A), to appeal a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, a defendant must first obtain a certificate of appealability from a district or circuit court judge. The Third Circuit recently held that Section 2253(c)(1) authorizes a district judge to issue a certificate of appealability. United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," and the showing must be made for each issue for which the certificate is sought. 28 U.S.C.A. § 2253(c)(2), (3)(West Supp. 1997). Because, as discussed above, Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court will not grant him leave to appeal this decision to the Third Circuit.